Question #8 submitted by committee member Vander Broek

I assume that surgical technologists do not carry malpractice insurance of their own, but any malpractice action would be taken against the supervising licensed professional. In the event of a malpractice case regarding a surgical technologist, against which professional or entity would the action be filed?

Surgical technologists do not often independently carry malpractice insurance. It would be a rare occurrence that a surgical technologist would have action related to malpractice taken against them. Instead the "Captain of the Ship" doctrine would be applied in these cases which suggests that a surgeon has the ultimate responsibility for the care of the patient, and has a non-delegable duty to ensure that proper care is given while in the operating room.

The phrase "Captain of the Ship" was first created by the Pennsylvania Supreme Court in McConnell v. Willimas, 361 Pa. 355, 65 A.2d 243, 246 (1949) where the court stated that ". . . It can readily be understood that in the course of an operation in the operating room of a hospital, and until the surgeon leaves that room at the conclusion of the operation . . . he is in the same complete charge of those who are present and assisting him as is the captain of a ship over all on board …"

McConnell specifically addressed the question of whether a surgeon could be liable for the negligence of an intern who was employed by the hospital. On appeal, the Pennsylvania Supreme Court held that when the surgeon requested the assistance of the intern who was employed by the hospital, the surgeon became responsible for the negligent acts of this "borrowed servant." The court reasoned that, when the surgeon was in the operating room, he was in charge of those assisting him just as a captain of a ship was in charge of all on board. The true test of liability was whether the principal had control over the agent when the agent committed the negligent act. Ultimately, the Pennsylvania Supreme Court articulated the "Captain of the Ship" doctrine, holding surgeons responsible for any negligent conduct in the operating room just as a captain of a ship is responsible for the actions of its crew.

The Nebraska Supreme Court has adopted this "Captain of the Ship" doctrine. In Darrah v. Bryan Memorial Hospital, 253 Neb. 710, 571 N.W.2d 783 (1998), the Court indicated that during surgery, the head surgeon assumes exclusive control of the patient and is generally responsible for the actions of other members of the surgical team. The duty imposed upon the surgeon with respect to his or her surgical team means that a physician cannot avoid liability for negligence when the physician "assigns work consequent to a duty." Swierczek v. Lynch, 237 Neb. 469, 482, 466 N.W.2d 512, 520 (1991).

Source: Understanding Physician Liability Under Nebraska's So Called "Captain of the Ship" Doctrine By Sarah Macdissi on April 5, 2013 http://ldmmedlaw.com/understanding-physician-liability-under-nebraskas-so-called-captain-of-the-ship-doctrine/

Links to two cases supporting the "Captain of the Ship" doctrine:

(1) Darrah v. Bryan Memorial Hospital: http://law.justia.com/cases/nebraska/supreme-court/1998/1391-0.html
(2) Long v. Hacker: http://law.justia.com/cases/nebraska/supreme-court/1994/1207-0.html

Relevant quote on surgeon's liability from each case:

From Darrah: "For example, hospitals are generally responsible for the acts of their agents via vicarious liability and respondeat superior. See Swierczek v. Lynch, 237 Neb. 469, 466 N.W.2d 512 (1991). See, also, Uryasz v. Archbishop Bergan Mercy Hosp., 230 Neb. 323, 431 N.W.2d 617 (1988). ***During surgery, however, the head surgeon has a nondelegable duty to provide health care and assumes exclusive control of the patient. Long v. Hacker, 246 Neb. 547, 520 N.W.2d 195 (1994); Swierczek, supra"***

And from Long v. Hacker: "In Swierczek, we stated:
The hospital and surgeon cannot escape liability by attempting to delegate the responsibility for activity in the operating room to the anesthesiologist or other staff present there. ***The duty of care owed by a physician is nondelegable, which "means that an employer of an independent contractor... by assigning work consequent to a duty, is not relieved from liability arising from the delegated duties negligently performed. [Citation omitted.]*** As a result of a nondelegable duty, the responsibility or ultimate liability for proper performance of a duty cannot be delegated, although actual performance of the task required by a nondelegable duty may be done by another." Foltz v. Northwestern Bell Tel. Co., 221 Neb. 201, 213, 376 N.W.2d 301, 309 (1985). In plain language, the law ordinarily does not permit a tort-feasor to escape liability by the act of attempting to transfer responsibility for a nondelegable duty to an independent contractor.

237 Neb. at 482, 466 N.W.2d at 520.

All of the testifying medical experts, as well as Hacker himself, agreed that it is a fundamental and nondelegable duty of an operating surgeon to localize the operative site of the patient."